88-2097

No.

Supreme Court, U.S.
FILED
JUN 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1988

STEVE GOODMAN, DBA SUREFIT DENTAL LAB, DBA STEVEN'S DENTAL LAB - - - - - - Petitioner

versus

KENTUCKY BOARD OF DENTISTRY - - - - - - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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Counsel of Record for Petitioner

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QUESTION PRESENTED FOR REVIEW

Comes the Petitioner, Steve Goodman and Steve Goodman, d/b/a Surefit Dental Lab, d/b/a Steven's Dental Lab, by counsel, and in support of its petition for writ of certiorari pursuant to Supreme Court Rule 21, *et al.*, now states as follows:

The specific question presented for review before this court is whether an injunction can be held to be violated by an enjoined party due to the actions of third parties, other than agents of the enjoined party, who have not received actual notice of the injunction by personal service or otherwise. The Petitioner pleads that he has been denied a due process trial by the lower court's arbitrary and capricious rulings that the Petitioner can be held responsible for a violation of an injunction and placed in jail for actions of third parties who are not parties to the injunction suit or who have not received notice of the injunction by personal service or otherwise.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, Steve Goodman and Steve Goodman, d/b/a Surefit Dental Lab and d/b/a Steven's Dental Lab and the Kentucky Board of Dentistry.

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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1988

STEVE GOODMAN, d/b/a SUREFIT DENTAL LAB, d/b/a STEVEN'S DENTAL LAB - *Petitioner*

v.

KENTUCKY BOARD OF DENTISTRY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

A copy of the permanent injunction issued by the Hardin Circuit Court, a copy of the opinion of the Kentucky Court of Appeals, and a copy of the Ruling of the Supreme Court of Kentucky denying discretionary Review is attached hereto for the Court's reference by its Appendix.

This Court may entertain jurisdiction of any matter when a state court of last resort has decided a federal question involving the due process rights of the Petitioner in such a way as to come into conflict with the decision of another state court of last resort or a federal court of appeals or if in the determination of this court that this federal question in the form herein presented has not been settled but comes into conflict with applicable decisions previously rendered by the Supreme Court pursuant to 28 U.S.C.

The Supreme Court of Kentucky entered an Order dated March 29, 1989 denying a motion for discretionary review. The Kentucky Court of Appeals in Case Number 87-CA-002497 issued its order affirming the trial court's findings of fact and conclusion of law on March 30, 1989. The Hardin Circuit Court entered its order finding the Petitioner in contempt of its previous order prohibiting him from practicing dentistry on November 19, 1987.

There was not any orders entered respecting a rehearing and therefore no date and terms of any orders granting or denying an extension of time have previously been entered concerning this criminal contempt matter.

No cross-petition for writ of certiorari has been filed under Rule 19.5.

An order denying a motion for discretionary review by the Supreme Court of Kentucky is not subject to rehearing and the only possible redress allowed to the Petitioner is by writ of certiorari to the Supreme Court of the United States.

STATEMENT OF THE CASE

The Petitioner contends that the Fourteenth Amendment to the Constitution allows the Petitioner to a due process hearing and that previous orders of the court making him vicariously responsible for the actions of non-employees or agents who have not received notice of the injunction nor who are parties to the injunction is a violation of the Petitioner's constitutional guarantees as afforded by the Constitution of the

United States. The Petitioner, herein, was permanently enjoined by order of the Hardin Circuit Court, Honorable Hugh Roark, Judge, presiding, on April 7, 1987. (Clerks Record, pp. 63-65). This injunction was issued only against the Petitioner, and according to the Hardin Circuit Clerk's attestation, *no* third parties were given notice of said injunction by personal service or otherwise. Under Kentucky State Law, this injunction would bind the Petitioner as well as agents of the Petitioner, but would *not* bind the actions of additional third parties unless these parties were acting in concert or participation with the enjoined party and had received actual notice of the injunction by personal service or otherwise. (Kentucky Rules of Civil Procedures 65.02)

In *White* v. *Sullivan*, Ky. App., 667 S.W. 2d 385 (1983), the Kentucky Court of Appeals held that the actions of a third party were bound by that injunction due to the fact said third party received actual notice of the prior injunction, and had been acting in concert with the enjoined party and violating said injunction since the time of receiving notice.

In applying this holding to the case before this court, only the actions of Steve Goodman and any agent would be bound by the injunction entered April 7, 1987. Records indicate that no notice of this injunction was provided to any other person other than the Petitioner. Therefore, the actions of any additional third party, even if found to be acting in concert, participation or association with the Petitioner would not be enjoined by the April 7 1987 permanent injunction.

The Petitioner could not violate the April 7, 1987 injunction thru the actions of a third party, other than an employee who had received notice of the injunction.

The evidence presented to the lower court was insufficient to support the Kentucky Court of Appeals finding that the third party who took impressions of the mouth of a Dennis W. Goodin and fitted him with a denture, and who repaired a partial denture belonging to Evelyn Taylor, was an agent or employee of Steve Goodman. Kentucky Law holds that the question of whether a person is an agent or an employee of another, or is a separate, independent contractor, depends upon the relationship between the two parties at the time in question. *Sam Horne Motor and Implement Company* v. *Greeg*, Ky., 279 S.W. 2d 755 (1955). This case was further reaffirmed by the Kentucky Court of Appeals in *Carnes* v. *Department of Economic Security*, Ky., 435 S.W. 2d 758 (1968).

There is no indication of any degree of control by the Petitioner concerning the alleged agent. Steve Goodman testified that he had no control over the activities of Susan Howlett (T.T., 11/12/87, p. 32, lines 19-21), the arrangement being one of "sharing space" (T.T., 11/12/87, p. 32, lines 4-5). The activities of Susan Howlett were not supervised by the Petitioner (T.T., 11/12/87, p. 33, lines 2-7). There was further proof thru the transcript that Susan Howlett did *not* split fees with the Petitioner nor have any employer/employee relationship or responsibility. The testimony also established that the Petitioner received *no* portion of Ms. Howlett's fees (T.T., 11/12/87, p. 43, lines 18-

20). Nor did the Petitioner pay any salary to, or pay any taxes on Susan Howlett (T.T., 11/12/87, p. 33, lines 15-24).

The undisputed evidence established that Susan Howlett was not an agent or employee of the Petitioner, and Susan Howlett did not receive actual notice of the April 7, 1987 permanent injunction thru personal service or otherwise. Her action can not be held to violate said injunction. In summary, no evidence at all existed to hold the Petitioner responsible for the actions of a third party and according to all the testimony, the Petitioner was not even present on the day the acts were allegedly performed.

Kentucky law as to injunctions requires that it "shall be specific in terms and shall describe in reasonable detail . . . the act restrained or enjoined. (Civil Rules of Procedure 65.02(1)). Despite the specificity of enjoined acts listed in the April 7, 1987 permanent injunction, the Petitioners' actions as revealed in the evidence do not in any way violate such injunction, despite all lower court's findings. Since the time of the April 7, 1987 injunction, the Petitioner has faithfully complied with the injunction and has not repaired any dentures nor has he personally made any molds or impressions nor has he received any fees for doing any of these acts.

The review is sought of a state court judgment and the argument previously presented was raised in the November 12, 1987 transcripts of proceedings and was properly preserved for review by objection and argument of counsel for the petitioner (T.T., 11/12/87, p. 51,

line 23, p. 52, line 14). While not couched in the specific terms of "due process," the argument concerning due process was clearly raised alleging that an individual can not have been held to violate an injunction thru the actions of third parties who have not received actual notice of the injunction by personal service or otherwise.

The Kentucky Court of Appeals and the Kentucky Supreme Court have decided a federal question in a manner inconsistent with the decision of other courts. The Petitioner alleges that there are special and important reasons for not permitting a Petitioner to be incarcerated for actions outside of the scope of the injunction which had been entered against him. Furthermore, the decision of the Court of Appeals is inconsistent with other highest state Court Rulings, see: *Re: Elrod* (1984, Fla. App. D4) 455 So. 2d 1325, 9 Fla. 2015; *Williams International Corp. v. Smith*, (1985) 144 Mich. App. 257, 375 N.W. 2d 408; 413 N.W. 2d 392; *Re: Contempt of Liles*, (1984) 217 Neb. 414, 349 N.W. 2d 377; *Jacquin v. Pennick*, (1982) 449 A. 2d 769.

Respectfully submitted,

JOHN T. FOWLER III

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(502) 582-1347

Counsel of Record for Petitioner

APPENDIX

No. 86-CI-700

HARDIN CIRCUIT COURT

DIVISION II

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

STEVE GOODMAN

AND

STEVE GOODMAN, d/b/a
SUREFIT DENTURES LAB and
d/b/a STEVEN'S DENTAL LAB - - *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came to be heard on the 17th. day of March, 1987 on the Plaintiff's Motion to hold the defendant in contempt of court for violating the Temporary Injunction issued by the court on the 24th. day of June, 1986 prohibiting the defendant from operating or managing a dental laboratory within the geographical limits of the state of Kentucky and to allow the filing of a Second Amended Petition alleging the illegal practice of dentistry.

Evidence was heard that on October 2, 1986, the Plaintiff issued a Certificate of Registration to the Defendant allowing said Defendant to operate a dental laboratory. This Certificate, however, did not in any manner allow the Defendant to do any act expressly reserved for a licensed dentist as expressed in KRS 313.020, such as taking impressions of the human teeth or jaws.

Evidence was heard from Leonard Gray, that in February of 1987, the Defendant did in fact take impressions of the teeth and jaws of Mr. Gray and did in fact fit Mr. Gray with a set of dentures and charged a fee, all without a work order from a licensed dentist and all in violation of KRS 313.010 (2).

This court will not find the Defendant in Contempt of Court for violating the Temporary Injunction issued June 24, 1986 because the Defendant was subsequently certified by the Plaintiff to operate a dental laboratory. However, after hearing the testimony of Leonard Gray, reviewing the Findings and Pleadings, and on Motion of the Plaintiff, the Temporary Injunction is hereby dissolved and a Permanent Injunction is now issued in accordance with the following guidelines.

CONCLUSIONS OF LAW

* * * * * * *

Therefore, it is hereby ordered that a Permanent Injunction be and is hereby granted against the Defendant from performing dental operations of any kind or from diagnosing or treating diseases or lesions of human teeth or jaws, or from taking impressions of the human teeth or jaws to be used directly in the fabrication of an intraoral appliance, or from constructing, supplying, reproducing, or repairing any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written laboratory procedure work order of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist.

It is further ordered that the Defendant is permanently enjoined from performing any act reserved for a licensed dentist as expressed in KRS 313.010 (2).

It is further ordered to insure compliance, that the Defendant be required to post a Compliance Bond in the amount of $_____. This is a final and appealable order, there is no just reason for delay.

(s) Hugh Roark
Judge

Date April 7, 1987

ENTERED April 7, 1987, and attested copies served on attorneys of record.

ATTEST: David Owsley, Clerk
Hardin Circuit Court

(s) By: N. Upton D.C.

HARDIN CIRCUIT COURT

DIVISION II

Civil Action No. 86-CI-700

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

STEVE GOODMAN

AND

STEVE GOODMAN, d/b/a
SUREFIT DENTAL LAB,
d/b/a STEVEN'S DENTAL LAB - - - *Defendants*

AMENDED ORDER

This case came before the Court for a hearing on the motion of the Defendant pursuant to KRS 313.022 after a warrant of arrest was issued on affidavits filed by the Plaintiff. Said affidavits showed a violation of the Injunction entered by this court on April 7, 1987.

The Court, after hearing the testimony of the affiants and witnesses and considering the arguments of counsel, finds that the Defendant violated the Injunction entered against him on April 7, 1987 and violated KRS 313.010 in that on October 5, 1987 and for a fee Steve Goodman and his associates at the Surefit Dental Lab, owned and operated by Steve Goodman, made an examination of and inserted their hands into the mouth of Dennis W. Goodin and made an impression of Goodin's mouth for the purpose of constructing a denture, without a work order or prescription from a licensed dentist; and that on June 8, 1987

a person working in Steve Goodman's Surefit Dental Lab did repair a partial denture for a fee for Evelyn Taylor without a work order or prescription from a licensed dentist.

WHEREFORE, IT IS ORDERED that the Defendant is found to be in contempt of Court and in punishment thereof the Defendant shall be incarcerated in the county jail for a period of thirty (30) days with credit for the time already served of three (3) days.

Pursuant to the Defendant's request an appeal bond in the amount of $500.00 is set and the Defendant shall not be confined pending an appeal upon his posting of said bond.

This is a final and appealable Order, there being no just cause for delay.

Entered this 19th day of November, 1987.

(s) Hugh Roark
Judge, Hardin Circuit Court
Division II

ENTERED November 19, 1987, and attested copies served on attorneys of record.

ATTEST: John Pearman, Clerk
Hardin Circuit Court

(s) By: N. Upton D.C.

RENDERED: DECEMBER 29, 1988; 3:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 87-CA-2497-MR

STEVE GOODMAN, d/b/a
SUREFIT DENTAL LAB d/b/a
STEVEN'S DENTAL LAB - - - - *Appellants*

v.

KENTUCKY BOARD OF DENTISTRY - - - *Appellee*

Appeal from Hardin Circuit Court
Honorable Hugh Roark, Judge
Action No. 86-CI-700

AFFIRMING Filed March 30, 1989

BEFORE: HOWERTON, Chief Judge, DUNN, Special Judge and HAYES, Judge.

HAYES, JUDGE: Steve Goodman, d/b/a Surefit Dental Lab and Steven's Dental Lab, appeals from an order entered November 19, 1987 in Hardin Circuit court finding him in comtempt of its previous order prohibiting him from practicing dentistry. Finding no reversible error, we affirm.

Under KRS 313.530, no person, firm, association, corporation, or any combination thereof shall undertake to operate a commercial dental laboratory or act as a dental laboratory technician, whether within or outside the office of a licensed dentist, or to do or perform any of the acts described in the statute without having first registered with the Board of Dentistry and having received a certifi-

cate of authority therefrom, as provided in KRS 313.510 to KRS 313.540. Under KRS 313.540, the Board may maintain an action to enjoin such person, firm, etc. which has failed to register as required. *Gambrel* v. *Kentucky Bd. of Dentistry*, 689 F. 2d 612 (6th Cir. 1982).

The factual background is as follows. On October 2, 1986 the Kentucky Board of Dentistry issued a Certificate of Registration to appellant permitting him to operate a dental laboratory. This certificate does not permit the doing of any act expressly reserved for a licensed dentist, however, such as taking impressions of teeth or jaws. KRS 313.010(2). KRS 313.020. *Manning* v. *Kentucky Bd. of Dentistry*, Ky. App. 657 S.W. 2d 584 (1983).

On June 12, 1986, the Kentucky Board of Dentistry sought to enjoin the appellant from operating his dental laboratory for failure to comply with statutes requiring registration and for ignoring requests to employ a certified dental technician as required by board regulations. On April 7, 1987, a permanent injunction issued, prohibiting appellant from

> performing dental operations of any kind or from diagnosing or treating diseases or lesions of human teeth or jaws, or from taking impressions of the human teeth or jaws to be used directly in the fabrication of any intra-oral appliance, or from constructing, supplying, reproducing, or repairing any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written laboratory procedure work order of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist.[1]

---

[1]Taken from the broad definition of "practicing dentistry" set out in KRS 313.012(2).

On October 16, 1987, an arrest warrant was issued against appellant for practicing dentistry without a license, and on November 12, 1987, a formal hearing was held, resulting in the contempt order and 30 day jail sentence. Specifically the trial court found that appellant and his associates had inserted their hands into the mouth of Dennis Goodin for the purpose of constructing a denture, without a work order or prescription from a licensed dentist. In addition on June 8, 1987, a person working for the appellant did repair a denture for Evelyn Taylor without such work order or prescription.

On appeal, appellant initially claims that the actions of a third party, Susan Howlett, not named in the injunction, cannot be prohibited, and therefore he is not responsible for her actions. Under CR 65.02, injunctions are "binding upon the parties to the action, their officers, agents, and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise." Appellant maintains that the required notice was not received by Susan Howlett. Even if this is true, however, the court expressly found that appellant performed the prohibited acts on Dennis Goodin on October 5, 1987. This violation alone was sufficient to hold appellant in contempt. It also appears that Howlett was not a "third person" at all. The injunction was issued against not only appellant, but "Steven's Dental Lab." KRS 303.010(4) defines "dental laboratory" as *including* any person or firm "who directly or *through an agent or employee*, by any means or method, in any way supplies or manufactures artificial substitutes for the natural teeth . . . or who furnishes . . . or constructs or repairs any prosthetic denture. . . ." Although this interpretation was not raised by appellee, it appears that the actions of Howlett, too, fell within the injunction.

Secondly, appellant argues that the evidence was not sufficient to support a finding that Howlett was his agent or employee. He maintains that she merely "shared space" with him. We disagree. The testimony and affidavit of Dennis Goodin indicates that Goodin understood Howlett to be appellant's "assistant." After Goodin had picked out a partial from a shoebox held out by appellant, appellant "called his assistant into the room, a woman named Sue," who then proceeded, at appellant's request, to take actual impressions of his mouth necessary for the manufacture of dentures. When Howlett finished taking the impressions, Goodin paid her $50 in cash, the price agreed on between him and appellant. Moreover, an affidavit taken by Evelyn Taylor indicates that at one time in June, 1987, Howlett introduced herself to Taylor as appellant's assistant. This testimony is sufficient to establish either an agency relationship or that the two acted in active concert or participation with each other, either of which satisfies CR 65.02.

Finally, appellant argues that the evidence was insufficient to support a finding that he personally violated the April 1987 injunction. Again we disagree. Dennis Goodin testified that in October, 1987, appellant agreed to fit him for a partial. After appellant removed some prostheses from a box, he washed his hands and examined Goodin's mouth with an instrument, placing his hands inside the mouth. Goodin then agreed to pay $170, with $50 down as a deposit. Goodin additionally remembered that a sign in front of appellant's office read "dentures" or "denturists," what appellant refers to as a yet "unrecognized profession." This testimony together with an advertisement in the phone book listing the service of "Denture Repairs (while you wait)" illustrates the type of operation which appellant was conducting, directly in violation of the April injunction and supporting statutes, enacted for the protection of the public.

Lewis v. *Kentucky Bd. of Dental Exmrs.*, Ky., 300 S.W.2d 241 (1957).

Accordingly, the order entered November 19, 1987 in Hardin Circuit Court is affirmed.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

89-SC-46-D
(87-CA-2497-MR)

STEVE GOODMAN, d/b/a
SURFIT DENTAL LAB and
d/b/a STEVEN'S DENTAL LAB - - - - *Movant*

v.

KENTUCKY BOARD OF DENTISTRY - - - *Respondent*

Hardin Circuit Court 88-CI-700

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW—Filed March 30, 1989

The motion for review of the decision of the Court of Appeals is denied.

ENTERED March 29, 1989.

(s) Robert F. Stephens
Chief Justice